Supreme Court, U.S.
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No. 01-909

IN THE

Supreme Court of the United States

BALTIA AIRLINES, INC.,

Petitioner,

v.

CANADIAN IMPERIAL BANK OF COMMERCE and CIBC OPPENHEIMER CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Does Baltia Air Lines, Inc. ("Baltia") have a private right of action under § 17A(b)(6) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78q-1(b)(6) (2000) ("Section 17A(b)(6)"), if that statute provides no express right of action and its legislative history indicates that the Securities and Exchange Commission ("SEC") would be responsible for the statute's enforcement?

Does Baltia have standing to assert that the Clearing Agreement violates Section 17A(b)(6) and, therefore, is voidable under § 29(b) of the Exchange Act, 15 U.S.C. § 78cc(b) ("Section 29(b)"), even though Baltia was not a party to the agreement, and the conduct about which Baltia complains is not proscribed by the statute?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Canadian Imperial Bank of Commerce ("CIBC")[1] and CIBC Oppenheimer Corporation ("Oppenheimer") are the respondents and the defendants in the action below.[2] Oppenheimer is a wholly owned subsidiary of CIBC. CIBC has no parent corporation and no publicly held company owns 10% or more of its stock.

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1. In the complaint below, Baltia has made no substantive allegations against CIBC. It alleged that CIBC is liable as a "control person" of Oppenheimer under § 20 of the Securities and Exchange Act of 1934, 15 U.S.C. § 78t.

2. In its petition, Baltia has named CIBC World Markets, CIBC Wood Gundy Securities, Inc., CIBC AeroGold Visa, CIBC AeroCorporate Visa, CIBC AeroMortgage and Aeroplan Frequent Flyer Program as Co-Respondents in this action. (Petition ii). None of these parties, however, were named in the complaint filed in this action and none are mentioned in the record below.

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Respondents Canadian Imperial Bank of Commerce and CIBC Oppenheimer Corporation respectfully oppose the petition for writ of certiorari filed by Baltia Air Lines, Inc. in this memorandum.

OPINIONS BELOW

The decision of the district court, Hon. Alvin K. Hellerstein U.S.D.J., is not reported and there is no formal written opinion. Judge Hellerstein's order dismissing the complaint specifically cites the reasons set forth at the hearing as the basis for the dismissal. (Pet. App. 8a-9a). The relevant portions of the transcript of the motion to dismiss hearing are set forth at Resp. App. 1a-9a.[3] The Second Circuit's decision is included in the appendix of Baltia's petition for writ of certiorari.

STATEMENT OF THE CASE

This is an unremarkable contract case that was first dismissed in state court, and then was recast as a federal securities claim and dismissed in federal court. No state or federal court that has been presented with the allegations of this case has found any claim upon which Baltia may recover, and there is no reason for this Court to devote its resources to hearing this case. Indeed, Baltia fails to present a single acceptable reason why this Court should hear this case. Ignoring Supreme Court Rule 10, Baltia concedes that the decision of the Second Circuit Court of Appeals in this case is not in conflict with the decision of any other court. (*See* Petition 12). This is unsurprising given that the Second Circuit's decision that no private right of action

3. Citations to "Petition" refer to Baltia's Petition for writ of certiorari. Citation to "Pet. App." refer to the Petition's appendix and citations to "Resp. App." refer to the appendix to this Opposition to Petition of writ of Certiorari.

exists under Section 17A(b)(6) is consistent with this Court's precedent, spanning decisions from *Cort v. Ash*, 422 U.S. 66 (1975) to the more recently decided *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511 (2001).

Furthermore, the Second Circuit's dismissal of Baltia's claim under Section 29(b), which allows a party to render void a contract that violates the Exchange Act, is unremarkable. The Second Circuit held that Baltia was barred by the doctrine of collateral estoppel from arguing that it had standing to challenge the clearing agreement (the "Clearing Agreement") between Oppenheimer and Hornblower & Weeks ("H&W") (Baltia's underwriter and investment banker) because in a prior litigation involving the same parties, a New York State Supreme Court, New York County determined that Baltia was a third-party without rights under the Clearing Agreement. Without standing, Baltia had no basis to void the Clearing Agreement under Section 29(b).

In any event, there is no basis for liability under Section 29(b) or 17A(b)(6) because the conduct about which Baltia complains is not proscribed by either statute.

A. Procedural History

On February 8, 1999, Baltia brought an action in New York State Supreme Court, New York County (the "State Court Action") to enforce purported rights arising out of the Clearing Agreement between Oppenheimer and a third-party, H&W, so that an initial public offering of its common stock (the "Baltia IPO") could be completed. The court rejected Baltia's claim, holding that Baltia could not compel action under the Clearing Agreement because it was not a party to that agreement, and later dismissed Baltia's complaint for

the same reason. The dismissal was unanimously affirmed by the Appellate Division of the Supreme Court, First Department ("Appellate Division"). (Pet. App. 12a-15a). Leave to appeal to the New York Court of Appeals was denied. (Pet. App. 10a, 11a).

Having failed in state court, Baltia filed an action in the United States District Court for the Southern District of New York on January 31, 2000 (the "Federal Action"). In addition to reasserting the claims rejected in the State Court Action, Baltia asserted claims under §§ 10(b), 18(a), 17A(b)(6), and 29(b) of the Exchange Act and claims under the Racketeer Influence and Corrupt Organization Act, 18 U.S.C. § 1962, *et seq.* (2000) ("RICO"). The court dismissed all of Baltia's claims during oral argument on the motion dismiss. It also held that Baltia was collaterally estopped from arguing that it was either a party to the Clearing Agreement or a third party beneficiary of that agreement as that issue had been argued and resolved in the State Court Action. (Pet. App. 6a-7a). The court dismissed Baltia's claim under Section 29(b) because Baltia could not argue that it was a party to the Clearing Agreement, and it dismissed Baltia's claim under Section 17A because there is no private right of action under that statute. (Resp. App. 6a-8a). By an unpublished decision dated April 25, 2001, the Second Circuit affirmed the District Court's decision in all respects, except that it vacated "the district court's decision not to impose sanctions [against Baltia] and remand[ed] the case for findings regarding the imposition or denial of sanctions pursuant to Section 21D(c)(1) of the Act." (Pet. App. 5a). Subsequently, Baltia filed its petition for a writ of certiorari.[4]

4. Respondents' opposition was originally due January 25, 2002, but at Respondents' request, the Court extended the time to file an opposition to February 15, 2002.

B. Statement of Facts[5]

Oppenheimer provides a broad array of financial services to its clients, including clearing services.[6] H&W (not Baltia) contracted for Oppenheimer's clearing services by a Clearing Agreement between Oppenheimer and H&W dated June 11, 1996.[7]

1. The Clearing Agreement

The Clearing Agreement provides that Oppenheimer "reserves the right to refuse to execute any transactions entered into for a customer account" and "reserves the right to reject any account that [H&W] may tender to [Oppenheimer]." With specific reference to the issuance or placement of securities, the type of transaction involved in the Federal Action, the Clearing Agreement provides (with emphasis added):

> [H&W] shall provide to [Oppenheimer] a written list of securities to which [H&W] intends to enter into, or join, a syndicate (whether as part of the underwriting or selling group) relating to the issuance or placement of those securities.

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5. The quoted contracts, transcripts and other documents quoted to or referred to herein are contained in the Record on Appeal to the Second Circuit in this matter.

6. Clearing services are the physical transfer and distribution of equities and other investment vehicles purchased and sold by broker dealer's customers.

7. At the time Oppenheimer entered in the Clearing Agreement with H&W, the latter company was named Baker Weeks & Co., Inc.

> [Oppenheimer] *shall have the right to limit or prohibit [H&W's] syndicate activities with respect to any security. Under no circumstances may [H&W] join a syndicate without the prior written approval of [Oppenheimer].*

Accordingly, H&W granted Oppenheimer the express right under the Clearing Agreement to refuse to provide clearing services in connection with any account, and to prohibit H&W from serving as an underwriter for the issuance of any securities without its prior approval.

In addition, the Clearing Agreement provides that "[Oppenheimer's] sole responsibility and liability is expressly provided by the agreement and limited to [H&W]." Thus, Oppenheimer and H&W agreed that the Clearing Agreement was not intended to benefit anyone who was not a party to it, and that no one other than H&W could claim rights against Oppenheimer under the Clearing Agreement.

2. H&W Agrees To Underwrite Baltia's IPO

In June 1998, Baltia contracted with H&W to underwrite its IPO. At or about that time, in accordance with the requirement of Rule 382(c) of the New York Stock Exchange,[8] H&W disclosed to Baltia the existence of its clearing relationship with Oppenheimer by providing Baltia something substantially in the form of the model disclosure statement that is attached to the Clearing Agreement (the "Disclosure Statement").

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8. NYSE Rule 382(c) provides that "[e]ach customer whose account is introduced on a fully disclosed basis shall be notified in writing upon the opening of the account of the existence of the agreement and of the relationship between the introducing and carrying organization."

3. Oppenheimer Exercises Its Express Contract Rights

Baltia did not allege in its complaint, nor does it argue in its Petition, that H&W ever received written permission from Oppenheimer to underwrite Baltia's IPO — as required by the Clearing Agreement. Additionally, Baltia neither argues nor alleges that Oppenheimer was informed that H&W had agreed to underwrite Baltia's IPO until late January 1999, when H&W first requested that Oppenheimer provide clearing services for the transaction, which was then scheduled for early February 1999. In response to H&W's request, Oppenheimer advised H&W on or about February 1, 1999 that Oppenheimer was exercising its contractual right to refuse to serve as the clearing agent for Baltia's IPO. H&W, in turn, informed Baltia that it could not proceed with the IPO. Baltia then commenced the State Court Action.

4. The Petition Includes Several Facts Not In The Record Below

This case was resolved on a motion to dismiss. Rather than amend its complaint in an attempt to cure the defects of its claims, however, Baltia has repeatedly tried to introduce facts into the record that are neither relevant to this case nor properly before the Court. The Petition is littered with "facts" that are either not included in the record below or which were part of a record specifically excluded by the District Court. (*See* Resp. App. 2a-5a). Specifically, the district court excluded a large volume of documents that, among other things, purported to demonstrate CIBC's financial interests in various competitors of Baltia. (*See id.*) The assertions in the Petition suggesting that Oppenheimer declined to clear the Baltia transaction because it had a financial interest (such as those at Petition 8, 20 n.22) in Baltia's competitors are

found nowhere in Baltia's complaint and are not present in the record below. Additionally, CIBC Wood Gundy Securities, Inc., CIBC AeroGold Visa, CIBC AeroCorporate Visa, CIBC AeroMortgage, and CIBC Frequent Flyer Program whom Baltia names as respondents are not named as parties to this action nor do their names appear anywhere in the record below.

Baltia also refers to a conversation with Melvin Weis, Esq., (*see* Petition 7), which is nowhere in the record below and irrelevant. Indeed, nothing from the first full paragraph of page seven to the end of the first full paragraph of page eight of the Petition can be found in the record below, and nothing in the first full paragraph on page nine of the Petition is in the record below.

REASONS FOR DENYING THE WRIT

I. BALTIA PROVIDES NEITHER A BASIS FOR GRANTING ITS PETITION NOR A BASIS FOR CREATING A PRIVATE RIGHT OF ACTION UNDER SECTION 17A(b)(6) OF THE EXCHANGE ACT

Baltia fails to argue that this case meets even the basic requirements of Supreme Court Rule 10, which articulates the types of cases this Court will hear. Instead, Baltia makes a series of policy arguments as to why the Second Circuit erred in denying Baltia a private right of action under Section 17A(b)(6) without a single citation to any authority that supports those arguments. (*See* Petition 12-22). In doing so, Baltia ignores both Supreme Court Rule 10 and a well established line of Supreme Court cases that dictated the Second Circuit's decision in this case that no private right of action exists under Section 17A where there is no evidence of a congressional intention to create such a right.

A. The Petition Fails to Identify Any Basis for Granting Certiorari Under Supreme Court Rule 10

As Chief Justice Rehnquist previously noted, the Court can accept only a fraction of the thousands of petitions for certiorari made every term. It, therefore, hears only the cases that demand its intercession. *See Hubbard v. United States*, 514 U.S. 695, 720 (1995) (Rehnquist C.J., dissenting). Supreme Court Rule 10 articulates the types of circumstances under which the Court grants certiorari:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on some important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of the Court's supervisory power;
>
> . . .
>
> (c) . . . a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Sup. Ct. Rule 10.

Baltia fails to identify a decision by any court that conflicts with decision of the Second Circuit in this case. To the contrary, Baltia acknowledges that Section 17A(b)(6) has not been interpreted by a federal court at any level. (Petition 12) ("No court has reviewed the rights devolving from subsection (6) to § 17A(b) of the [Exchange Act]"). Baltia also neglects to mention that, this Court has already declined invitation to review the only decision by a lower court that reviewed the language and legislative history of Section 17A and held that no private right of action exists thereunder. *Brawer v. Options Clearing Corp.*, 633 F. Supp. 1254 (S.D.N.Y.), *aff'd*, 807 F.2d 297 (2d Cir. 1986), *cert. denied*, 484 U.S. 819 (1987). The Court's decision not to hear *Brawer* is consistent with its policy of declining to hear cases in the absence of a conflict in federal decisional law created by the decision being appealed. *See Hubbard*, 514 U.S. at 720 ("[O]rdinarily a court of appeals decision interpreting one of our precedents — even one deemed to be arguably inconsistent with it — will not be reviewed unless it conflicts with a decision of another court of appeals.") A policy which militates strongly against the Court's granting certiorari in this case.

B. There Is No Basis for Finding a Private Right of Action Under Section 17A of the Exchange Act

Section 17A(b)(6) provides that "no registered clearing agency shall prohibit or limit access by any person to services offered by any participant therein." 15 U.S.C. § 78q-1(b)(6). As demonstrated below and again herein, both the plain language of the statute and its legislative history indicate that Congress intended for the SEC to enforce it; and nothing in the statute or in its legislative history indicates any congressional intent for Section 17A(b)(6) to be enforced

by a private right of action. Absent this, a private right of action may not be derived. *See Alexander*, 121 S. Ct. 1511, 1519-20.

Baltia offers nothing to dispute this analysis. It analyzes neither the language of the Section 17A(b)(6), nor its legislative history. It fails even to discuss that Supreme Court precedent which contemplates when a federal court may create a private right of action under a federal statute. It chooses instead to make a series of unsubstantiated policy arguments that cannot serve as a basis upon which to create a private right of action from Section 17A(b)(6). (Petition 12-22).

1. Recent Supreme Court Decisions Demand Clear Congressional Intent as a Prerequisite for Creating a Private Right of Action

A federal court may not derive a private right of action from a federal statute unless Congress intended to create such a right, and that intent is evident either in the plain language of the statute or in its legislative history. *See Alexander*, 121 S. Ct. at 1519-20 (holding that a federal court may only derive a private right of action from a federal statute when Congress has expressed an intention to create such a right); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 17-19 (1979); *Touche Ross & Co. v. Reddington*, 442 U.S. 560, 571 (1979); *Cort*, 422 U.S. at 73. Moreover, when the plain language of a statute does not explicitly provide for a private right of action, the Court will only infer such a right if congressional intent indicates that the statute was intended to create "not just a private right, but also a private remedy." *Alexander*, 121 S. Ct. at 1519. This narrow view of statutory construction is intended to curb the creation of private rights of action by the federal courts. *See id.* at 1520.

Recently, the Court offered stern warnings against lower courts wandering beyond the limitations of congressional intent when interpreting federal statutes. In *Alexander v. Sandoval*, the Court held that "[r]aising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals." 532 U.S. 275, 121 S. Ct at 1520. The *Alexander* Court warned the lower courts not to venture beyond congressional intent when analyzing federal statutes to determine whether or not to create a private right of action to enforce those statutes.

> The judicial task is to *interpret the statute* Congress has passed to *determine whether it displays an intent to create not just a private right but also a private remedy*. Without it, a cause of action *does not exist and a court may not create one*, no matter how desirable that might be as a policy matter, or how compatible with the statute.

Id. at 1520 (emphasis added).

Here, Baltia's only justifications for its request that the Court create a private right of action are its own unsubstantiated policy arguments. (*See* Petition 12-22). The mandates of *Alexander* indicate that such policy arguments are hopelessly insufficient.

2. The Statutory Language and Legislative History of Section 17A Provide No Support For the Derivation of a Private Right of Action by this Court

Neither the plain language nor the legislative history of Section 17A(b)(6) suggest that Congress intended to create a private right of action or a private remedy for violations of

the statute. Quite the contrary, a measured analysis of legislative intent indicates that Congress meant for Section 17A(b)(6) to be enforced by the SEC. In 1975, Congress amended the Exchange Act, adding Section 17A and several other statutes — including §§ 6, 19(g) and (h) and 21(d) and (c) (the amendments shall be referred to collectively as the "1975 Amendments"). In adding these amendments, Congress intended that the SEC "would play a much larger role than it [had] in the past to ensure there is no gap between self-regulatory performance and regulatory need." Senate Committee on Banking, Housing and Urban Affairs, S. Rep. No. 75, 95th Congr., 1st Sess. 23, *reprinted in* 1975 U.S.C.C.A.N. 179, 181 (referred to hereinafter as the "Senate Report"). The plain language of these amendments bear out this intention.

The amended Section 6 requires the registration of exchanges and self-regulatory organizations ("SRO") (e.g. NASD), and specifically empowers the SEC to regulate them. *See* 15 U.S.C. § 78f. Similarly, Section 17A requires that clearing agents be registered and subjects them to SEC scrutiny.

> (3) A clearing agency shall not be registered unless the [SEC] determines that —
>
> > (A) Such clearing agency is so organized and has the capacity to be able to facilitate the prompt and accurate clearance and settlement of securities transactions and derivative agreements, contracts and agreements for which it is responsible, to safeguard securities and funds in its custody or control or

> for which it is responsible to comply with the provisions of this chapter and the rules and regulations thereunder, to enforce (subject to any rule or order of the Commission pursuant to Section 78g(d) or 78s(g)(2) of this title) compliance by its participants with the rules of the clearing agency, and to carry out the purposes of this section.

15 U.S.C. § 78q-1(b)(3)(A). Finally, in Section 19 (which was part of the 1975 Amendments) Congress gave the SEC responsibility for enforcing this statutory scheme. Under Section 19(h)(1), the SEC is authorized to suspend or revoke the license of an SRO, exchange or clearing agent, or suspend any of the privileges conferred by that license "for the protection of investors, or otherwise in furtherance of the purposes of this chapter." 15 U.S.C. § 78s(h)(1). The SEC may exercise this power when a clearing agent or SRO violates the federal securities laws, the SEC Rules, the governing SRO's rules, or the internal rules of either the SRO or the clearing agent in question. *Id.* Thus, although the 1975 Amendments created new federal laws that protect investors, Congress intended for these laws to be enforced by the SEC.

Furthermore, Congress has acknowledged that the 1975 Amendments were intended to "significantly increase the regulatory options available to [the SEC] to deal with . . . perceived self-regulatory shortcomings." Senate Report, at 212.

> Although *self-regulation has not always performed up to expectations, on the whole it has worked well, and the Committee believes it should*

> *be preserved and strengthened. [The Amendments are] designed to accomplish this*, not only by clarifying regulatory responsibilities at all levels but also by assuring that the self-regulatory organizations follow effective and fair procedures, that their activities are not anti-competitive and that the Commission's oversight powers are ample and its responsibility to correct self-regulatory lapses is unmistakable.

Senate Report, at 201-02 (emphasis added).

Finally, when analyzing congressional intent to determine whether a private right of action may be derived, a court must consider whom the statute was intended to protect. *See e.g. Alexander*, 121 S. Ct. at 1521; *California v. Sierra Club*, 451 U.S. 287, 293 (1981); *Cort*, 422 U.S. at 80. Statutory language expressing an intention to protect a specific individual or class of individuals may be indicative of congressional intent to create a private right of action for that protected group. Conversely, when the focus of a statute is on regulating an entity or class of entities, and not on protecting a specific class of individuals, the Court has held that it will not infer an intent to provide a private right of action for any class of individuals. *Sierra Club*, 451 U.S. at 293-94; *see also Alexander*, 121 S. Ct. at 1521.

For example, in *Sierra Club*, the Ninth Circuit Court of Appeals had affirmed a decision by a district court that allowed citizens via a private right of action to enforce a federal statute prohibiting the construction of certain waterway obstructions. The Court reversed the Ninth Circuit's decision, reasoning that nothing in the federal statute indicated that it was for the benefit of any individual or class

of individuals, thus, no private right of action could be created.

> [T]he statute states no more than a general proscription of certain activities; it does not unmistakably focus on any particular class of beneficiaries whose welfare Congress intended to further. Such language does not indicate an intent to provide for private rights of action.

451 U.S. at 294.

While this Court has held that provisions of the Exchange Act are intended to protect investors, *see Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1103-04 (1991), no court has ever held that any of the provisions of Section 17A were intended to protect issuers. Nothing in Section 17A indicates that Congress intended for this statute to provide protection to issuers. Accordingly, there is no basis to conclude that Congress intended for this statute to create a private right of action for issuers.

"[W]hen Congress wished to provide a private damages remedy, it knew how to do so expressly." *Touche*, 442 U.S. at 572. Although Congress' failure to explicitly provide a private right of action is not dispositive, *see Transamerica*, 444 U.S. at 19, the Senate Report and the plain language of Section 17A and the other 1975 Amendments indicate that Congress intended the laws it created to be enforced by the SEC. In the face of this, Baltia offers no contrary argument, or points to a single iota of evidence, either in Section 17A's language or its legislative history, that Congress intended Section 17A to be enforced by anyone other than the SEC. Baltia, instead, focuses on what it believes the law "should"

be as a policy matter. In *Alexander*, the Court held that in the absence of specific Congressional intent to create a private right of action, courts may not create such a right "no matter how desirable that might be as a policy matter." 121 S. Ct. at 1519-20.

C. The Court Has Declined To Grant Certiorari in a Case Involving Similar Facts.

In *Brawer v. Options Clearing Corp.*, 633 F. Supp. 1254 (S.D.N.Y.), *aff'd*, (2d Cir. 1986), 807 F.2d 297, *cert. denied*, 484 U.S. 819 (1987), the Court declined to review a case in which a district court held that no private right of action existed under Section 17A. In that case, an investor sued a clearing agent for failure to follow its own internal policies, which is prohibited under Section 17A. The district court concluded that while Section 17A was enacted for the benefit of investors, the plain language of the statute and its legislative history evinced no congressional intent to create a private right of action; therefore, there was no basis for holding that a private right of action existed under Section 17A. *Id.* at 1258-61. The Second Circuit affirmed this decision, and the Court denied the investor's petition for writ of certiorari. *Id.*

The Court should similarly deny Baltia's petition. The same statute and legislative history are presented in this case that were presented in *Brawer*. In *Brawer*, the petitioner was an investor (a person within the class of people the statute was intended to protect), unlike here where the petitioner is an issuer, and not even Baltia argues that issuers are among the class of individuals Congress intended to protect by it passage of Section 17A.

II. BALTIA HAS NO CLAIM UNDER SECTION 29(b) OF THE EXCHANGE ACT BECAUSE IT WAS NOT A PARTY TO THE CONTRACT THAT IT ALLEGES VIOLATES SECTION 17A(b)(6), AND OPPENHEIMER DID NOTHING TO VIOLATE SECTION 17A(b)(6)

Baltia already litigated whether it was a party to the Clearing Agreement in the State Court Action, and both the trial and appellate courts held in that case that Baltia was not a party to the Clearing Agreement, could not benefit from its terms, and, thus, had no standing to challenge it. Because this issue was litigated in a prior suit, the State Court Action, both the district court and the Second Circuit held that Baltia was precluded from arguing that it was a party to the Clearing Agreement, (*see* Pet. App. 3a-4a, Resp. App. 8a), and, therefore, had no recourse under Section 29(b), which allows a party to void a contract that violates the Exchange Act. 15 U.S.C. § 78cc(b).[9] In any event, neither the terms of the Clearing Agreement nor Baltia's actions violated Section 17A(b)(6) so there is no basis for imposing liability under Section 29(b).

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9. It is worth noting that even if Baltia could claim a remedy under Section 29(b), such remedy would be of no benefit to it. The exclusive remedies available under Section 29(b) is rendering the contract void or rescinding. *See Greater Iowa Corp. v. McLendon*, 378 F.2d 783, 792 (8th Cir. 1967); *Natkin v. Exch. Nat'l Bank*, 342 F.2d 675, 676-77 (7th Cir. 1965). Neither rescission nor voiding the Clearing Agreement benefits Baltia in any way. If it cannot be awarded damages or compel Oppenheimer to clear the transaction its position is unchanged because it cannot complete its IPO.

A. Baltia Is Collaterally Estopped from Arguing that It Is a Party to the Clearing Agreement

Baltia is precluded by the doctrine of collateral estoppel from arguing that it was a party to or a beneficiary of the Clearing Agreement. That issue was already litigated and resolved by Baltia in the State Court Action where both the trial court and the appellate court held that Baltia was not a party to the Clearing Agreement and, therefore, could not benefit from it. Because this issue were necessarily resolved in a previous litigation, the District Court and the Second Circuit were precluded from revisiting it, *see Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 466 n.6 (1982), and both courts acknowledged as much. (*See* Resp. App. 8a, Pet. App. 3a-4a).

The New York State Supreme Court in the State Court Action held specifically that Baltia was not a party to the Clearing Agreement. The Appellate Division affirmed this decision holding:

> To the extent the complaint is based on the contention that Oppenheimer's refusal to clear transactions in securities issued by plaintiff constituted a breach of the clearing agreement between Oppenheimer and [H&W], plaintiff *has no standing to sue as a third party beneficiary of the clearing agreement*[.]

(Pet. App. 13a). The issue of Baltia's status vis-à-vis the Clearing Agreement was, therefore, decided in the State Court Action.

"[O]nce an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. 147, 153 (1979) (citing *Parklane Hosiery v. Shore*, 439 U.S. 322, 326 n.5 (1979)). Where a party has had a full and fair opportunity to litigate an issue in court, it will not be heard to raise that issue in a subsequent litigation. Respecting a prior courts decisions promotes judicial economy and spares parties the burden and cost of relitigating issues already resolved. *See id.*; *Kremer*, 456 U.S. at 466 n.11. Baltia has given this Court no basis to revisit these settled principals.

Here, Baltia asks the Court to render void the Clearing Agreement under Section 29(b). It can, however, only challenge an agreement to which it was a party. Baltia had a full and fair opportunity to litigate whether it was a party to the Clearing Agreement in a prior litigation — the State Court Action, and both the trial court and the appellate court in the State Court Action held that Baltia was not a party to the Clearing Agreement. (Pet. App. 10a, 11a, 13a). Because this issue was resolved in a prior litigation, both the District Court and the Second Circuit refused to revisit the issue, (*see* Resp. App. 8a, Pet. App. 4a), and there is no basis for this Court to reach a different result, and Baltia offers none.

B. The Clearing Agreement Does Not Violate Section 17A(b)(6), Nor Did Oppenheimer's Exercise of Its Rights Under that Agreement Violate Section 17A(b)(6)

Finally, Baltia has no basis to void the Clearing Agreement under Section 29(b) because the Clearing Agreement does not violate Section 17A(b)(6). Similarly, Oppenheimer's exercise of its rights under that agreement did not violate Section 17A(b)(6). Baltia's claim that it has a basis to void the agreement, therefore, cannot be sustained, and its petition should be denied.

Section 17A(b)(6) provides that "[n]o registered clearing agency shall prohibit or limit access by any person to services offered by any participant therein." 15 U.S.C. § 78q-1(b)(6). For Oppenheimer to violate this section, it must prohibit or limit access by a person to services offered by a "participant." A participant is defined as "any person who uses a clearing agency to clear or settle securities transactions. . . . Such term does not include a person whose only use of a clearing agency is . . . through another person who is a participant. . . ." 15 U.S.C. § 78c(a)(24). Thus, participant refers not to the clearing agent's ultimate customers, in this case Baltia, but to the clearing agency's introducing brokers, in this case H&W. Accordingly, Section 17A(b)(6) prohibits a clearing agent from prohibiting or limiting access to those services offered by its introducing brokers, but does not prevent a clearing agent from prohibiting or limiting access to its own services.

Applied to the matter at bar, the Clearing Agreement would violate Section 17A(b)(6) if its terms prohibited or limited Baltia's access to services offered by H&W. No such provision exists in the Clearing Agreement, and Baltia points

to none.[10] Similarly, Oppenheimer would only have violated Section 17A(b)(6) if it limited Baltia's access to H&W's services, which Oppenheimer did not do, and Baltia does not allege.

Finally, the Court has held that private rights of action derived from a statute — such as those created by the courts or administrative bodies — cannot be more restrictive than the statute from which they are derived. Accordingly, a party cannot be liable under a derived private right of action unless his behavior violates the original statute. *Central Bank of*

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10. Baltia's unduly broad interpretation of Section 17A(b)(6) is contrary to the plain meaning of the statute and, notably, is unsupported by a single case citation. Furthermore, under Baltia's misreading of the statute, a clearing agency would be unable to refuse to clear *any* trade presented to it by an introducing broker, even if the clearing agency determined that the trade was financial unfeasible, fraudulent or possibly even if the customer lacked available funds to pay for the trade. Discretion over which trades should or should not be cleared would shift from the handful of heavily regulated national clearing agencies to the tens of thousands of less regulated, less capitalized introducing brokers. Given that clearing agencies frequently get named, often (as here) frivolously, in suits involving questionable trading practices, *see e.g. Ross v. Bolton*, 904 F. 2d 819 (2d Cir. 1990); *Connally v. Havens*, 763 F. Supp. 6 (S.D.N.Y. 1991); *Schwarz v. Bear Stearns & Co.*, No. 603795/97, 1998 WL 672708 (Sup. Ct. N.Y. County, Aug. 24, 1998), *aff'd*, 266 A.D.2d 133, 698 N.Y.S.2d 855 (1st Dept. 1999), clearing agencies would be forced to become much more selective in determining the introducing brokers for whom they will clear, simply in order to limit their litigation expenses and possible exposure. Inevitably, the result of this process would be that many of the smaller, less established introducing brokers, such as those that primarily underwrite small initial public offerings or those that provide service to small numbers of individuals, would find themselves without clearing agreements and, thus, would be forced to cease operations.

Denver v. First Interstate Bank of Denver, 511 U.S. 164, 173 (1994). Thus, in *Central Bank*, the Court held that a defendant's acts could not give rise to a violation of Rule 10b-5 — a regulation promulgated by the SEC pursuant to its rulemaking power to enforce Section 10(b) of the Exchange Act — because those acts did not violate Section 10(b) of the Exchange Act. Here, neither the Clearing Agreement nor any act of Oppenheimer violates Section 17A(b)(6), so the remedies available under Section 29 for violations of the Exchange Act cannot attach.

C. Baltia Was Not a Party to the Clearing Agreement, and the Remedies Available Under Section 29(b) Are Unavailable To It

The Court has held that in order to avail oneself of the remedies available under Section 29(b) a litigant must be a party to the contract that it claims to be violative of the Exchange Act.[11] *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 388 (1970); *see also Natkin v. Exchange Nat'l Bank of Chicago*, 342 F.2d 675, 676-77 (7th Cir. 1965) ("Although a violation such as here alleged operates to void the contract rights of the party in violation . . . there is nothing in [Section 29(b)] which operates to create any right or cause of action against the party in favor of a stranger to the contract.") In *Mills*, the Court was asked by a group of minority dissenting shareholders to determine whether a merger was properly consummated when a proxy statements were false

11. At least one court has held that recovery under Section 29(b) is predicated on showing (1) that the contract involved a prohibited transaction, (2) that the plaintiff is in contractual privity with the defendant, and (3) the defendant is a class of person that the Exchange Act was intended to protect. *Cohen v. Citibank*, 945 F. Supp. 621, 626 (S.D.N.Y. 1996).

and misleading in violation of Section 14(a) of the Exchange Act. 15 U.S.C. § 78aa(a). The Court held that the minority shareholders had made out a claim under Section 14(a) of the Exchange Act. It, however, further concluded that Section 29(b) provided no basis upon which to void the merger as the minority shareholders were not parties to the merger agreement because they had not voted their proxies in favor of it.[12] *Id.* at 386-88.

Here, Baltia was not a party to the Clearing Agreement, which is the agreement it alleges to be violative of the Exchange Act. The Clearing Agreement is between H&W and Oppenheimer and by its terms is intended exclusively to benefit those parties. No court has held that Baltia was a party to that contract. In fact, a New York State Supreme Court, dismissed Baltia's suit to compel Oppenheimer to perform under the Clearing Agreement — a suit involving the same facts and parties as this case — based on its conclusion that Baltia was not a party to the Clearing Agreement. Baltia offers the Court no reason to reach a different conclusion.

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12. The Court further held that even if the minority shareholders had voted their shares on the misleading proxy statement, the remedy available under Section 14(b), rescinding or voiding their vote, was insufficient to undo the merger because it would be a rescission of only a fraction of the votes for the merger, and, therefore, would lead to no change in the result of the merger vote. *Mills*, 396 U.S. at 388 n.11.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX — RELEVANT PORTIONS OF TRANSCRIPT DATED JUNE 14, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

00 Civ. No.: 678 (AKH)

BALTIA AIRLINES,

Plaintiff,

- v -

CIBC OPPENHEIMER,

Defendant.

June 14, 2000
10:20 a.m.

Before:
HON. ALVIN HELLERSTEIN, District Judge

APPEARANCES

STEFFANIE LEWIS
STEVEN ORLIKOFF
Attorneys for Plaintiff

SCHULTE ROTH & ZABEL, LLP
Attorneys for Defendant
FREDERICK P. SCHAFFER
MARTIN ZERWITZ

* * *

MS. LEWIS: Your Honor, I am Steffanie Lewis representing Baltia Airlines.

THE COURT: Yes, Ms. Lewis.

MS. LEWIS: This is why we are here today. This is in your Exhibit Number 2. It is under your tab, maps. This is the route Baltia had from New York to St. Petersburg. These other routes you see serving St. Petersburg are CIBC Oppenheimer's Airlines. Baltia's route is approximately eight hours. These — Baltia's route started in New York. 30 percent of the traffic to St. Petersburg is from New York.

CIBC Oppenheimer Airlines starts from Toronto. They take, minimally, 12, as many as 16 hours. We will show that this alliance of airlines was instrumentally developed by CIBC and the only really viable competition was a non-stop direct route.

This chart shows the financial interests in those airlines which CIBC had.

THE COURT: Take your time. Don't lose the screws.

MS. LEWIS: This is under the tab CIBC financial interests in Baltia's competitors and it is Exhibit Numbers 17 through 76.

MR. SCHAFFER: Your Honor, I am afraid we are at a loss to know what exhibits are being referred to.

THE COURT: She just said but you didn't hear. Repeat please.

MS. LEWIS: This exhibit shows the financial interest that CIBC has in the airlines.

MR. SCHAFFER: That wasn't my question. My question is what are these exhibits to.

MS. LEWIS: They are relevant —

THE COURT: The question —

MR. SCHAFFER: What document are they contained in?

THE COURT: We are looking for them as you speak.

MS. LEWIS: I am sorry. They are in these exhibits for today. They were delivered to your law firm.

THE COURT: We don't have them. Yes.

MR. SCHAFFER: When were these delivered? I don't have them, your Honor, and on a motion to dismiss I am not sure why these exhibits from outside of the record are being referred to.

THE COURT: This came in yesterday, right?

MS. LEWIS: That's correct, your Honor.

THE COURT: So how could you make these part of your opposition?

MS. LEWIS: Two reasons. First, my understanding was from the plan management that you wanted to have an understanding of what this was about. Secondly, scienter is an issue here. We have motive opportunity. We are here whether or not there is a claim and whether or not there should be access to the courts to resolve it. This is the —

THE COURT: Is this a case management conference today?

MS. LEWIS: Yes, it is. It was scheduled for today.

MR. SCHAFFER: My understanding was we were here on oral argument to dismiss your Honor.

THE COURT: Just a moment.

(Pause)

THE COURT: I am advised that we originally had this as a case management conference but when the motion came in, since it attacks the sufficiency of the pleadings we advised the parties that we would be taking this as an argument.

To the extent the case management conference is appropriate we will follow the argument if anything remains in the complaint but this is a motion to dismiss and these papers are not properly included with your opposition papers. They are out of time.

I am handing these back to you. I am not considering them. Take those back and argue the motion without your charts.

In any event, the financial motivation which may or may not exist in the scheme that you outlined is not directly relevant to the questions that are put by Mr. Schaffer's motions.

This is an alleged fraud in connection with a purchase or sale of securities or other aspects of the claims that you pleaded were available to you. Is there res judicata, collateral estoppel by reasons of the decisions of the appellate division?

Take those down, please.

* * *

THE COURT: So Hornblower would have an action potentially against Oppenheimer. That doesn't mean that Baltia has an action.

In fact, I believe that Mr. Schaffer is correct in his footnote one on page 2 of his reply brief in saying that there is no private right of action under Section 17(a) of the Exchange Act.

He cites Bra[w]er v. Options Clearing Corp., 633 F. Supp. 1254, 1261, a decision of Judge Stanton of this court affirmed by the Second Circuit, 807 F.2d 297. The decision being on other grounds —

MS. LEWIS: Our action is not based on 17(a). What we are saying is that when Congress set this up it did not want to see the power in the clearing agency to say —

THE COURT: Ms. Lewis, if you are not proceeding under Section 17 why is there this long exegesis telling me about it?

MS LEWIS: Because they have violated.

THE COURT: That may be or may not be but it is of no concern of yours because you don't have a right to sue them for it.

MS. LEWIS: All right, then what I am saying is that Section 29 of the Securities and Exchange Act states that any contract in violation of any act, any part of the Exchange Act, is void.

THE COURT: It is not for you to say whether it is void or not. You don't have standing. There is no private right of action under Section 17(a). You have just agreed.

Let's go back to the complaint, please, and tell me why it is deficient; why this is a fraud allegedly in connection with the purchase or sale of a security.

MS. LEWIS: I turn to the definition of sale in the Securities and Exchange Act that would be controlling on that definition because we are dealing here with the action within it. It is Section 3, number 14 and number 13.

The terms buy and purchase each include any contract to buy, purchase or otherwise acquire. The term sale itself each include any contract to sell or otherwise dispose of. When the difference —

THE COURT: The unwillingness of Oppenheimer to be clearing broker and the alleged failure to tell people about that, that doesn't have to do in my judgment with the purchase or sale of a security as the required criteria set out by Bankers Life made it to be and many other cases.

This is not a fraud in connection with the purchase or sale of the securities. I think Mr. Schaffer is absolutely correct. You lack standing under Section 10(b).

What other causes of action?

It is a very difficult complaint to read. There is no identified claims for relief. It just goes on and on and on alleging all kinds of things under all kinds of statutes.

MS. LEWIS: Your Honor, I refer you to the submission made yesterday to you directly.

THE COURT: Yesterday was too late. There is a time and place for everything. I hold —

MS. LEWIS: I will —

THE COURT: Ms. Lewis, I hold that you have no standing to sue or complain against Oppenheimer under the clearing agreement. The clearing agreement is between Hornblower and Oppenheimer and you may not invoke it.

I hold along with the appellate division on the merits and because of collateral estoppel that there was no fraud of your client under the public disclosure statement.

Appendix

I hold that you have no right to invoke the clearing agency as a basis for suit.

I hold that you have no basis to complain for a violation of the National Clearing System.

The appellate division has spoken on the issue of contract, whether unilateral or promissory estoppel or anything else. You are not a party to the contract.

You are [not] entitled to have third-party beneficiary status under the contract.

I hold you have not stated a claim for interference with contract. The contract is a normal clearing contract between Hornblower and Oppenheimer and is a right on the part of the clearing agent to decide for itself whether or not it will want to become a clearing agent for the customer. They can take on a customer for itself.

I am now up to page 51 of your complaint. There is no right under a client's part to be a third-party beneficiary. The appellate division so holds both on collateral estoppel and on the merits. I hold that you have no standing to be a third-party beneficiary.

I have already ruled — I am now up to page 70 of the complaint — that you have not appropriately alleged a fraud in connection with the securities transaction and therefore you cannot invoke Section 10(b) of the Exchange Act or Rule 10(b)(5) or 18(a) thereunder.

Furthermore, I do not believe that you have properly alleged a predicate acts or other constituent parts of a RICO case and therefore there is no basis for a claim under RICO.

I have gone through your complaint. I find the complaint lacks merit.

I grant the motion to dismiss.

These are the conclusions. It will be issued this afternoon or Monday.

Mr. Schaffer's motion for sanctions is denied.

Thank you all.

(Proceeding adjourned.)